STATE OF MICHIGAN

COURT OF APPEALS

LAKEWOOD HILLS,

Petitioner-Appellant,

v

EAST GRAND RAPIDS BOARD OF ZONING APPEALS,

Respondent-Appellee.

UNPUBLISHED
January 27, 2009

No. 280972
Kent Circuit Court
LC No. 06-005958-AA

Before: Zahra, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Petitioner Lakewood Hills appeals as of right from the circuit court order denying its motion for reconsideration of an earlier order that affirmed respondent's denial of petitioner's request for zoning variances. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Petitioner owns real property in the City of East Grand Rapids that is zoned "B-1 Apartment." The property is a nonconforming use, albeit lawful, because the apartments on the property do not conform to ordinance requirements in terms of number, height, and square footage. In March 2006, petitioner filed a variance request with respondent seeking the following non-use variances: 1) to increase the maximum number of units per residential building from four units to 14 units;[1] 2) to increase the maximum height of certain buildings from two stories and 35 feet to six stories and 65 feet; and 3) to decrease the minimum apartment size to 2,220 square feet. If granted, the variances would add 21 units to the complex, for a total of 72 units. This would significantly exceed the 40 units permitted under the applicable ordinance. The variances would also reduce the existing apartment unit size and would permit the buildings to be 85 percent taller than the height that is currently allowed by the ordinance. Petitioner argued, in part, that the variances were justified because they were consistent with the zoning requirements of an adjacent property that was known as the "Jade Pig Development" and

[1] The parties agreed to the temporary removal of this request and agreed to pursue this if the remaining variances were granted.

that was zoned as a planned unit development (PUD), which allowed taller buildings and denser development.

Respondent heard petitioner's variance requests at a public hearing on May 15, 2006. At this meeting, respondent reviewed various materials, including petitioner's original application and supplements, and heard public comments. The city planner, city attorney, and members of the board also participated in this discussion. Respondent tabled the variance requests until the next month's meeting. At the June 5, 2006, meeting, respondent heard additional comments and decided to deny the variance requests. It issued a resolution detailing its findings and analysis.

Petitioner appealed the denial of its variance requests to the Kent Circuit Court. In a written opinion affirming respondent's decision, the circuit court observed that "preserving a community's identity is a legitimate objective" and "so is preserving an area's aesthetics." The court also stated that petitioner was not entitled to the variances simply because a variance had been given to another developer:

> Because the other developer's structure will be set back from the street, not on it as will be petitioner's proposed new structures, and will be behind petitioner's current structure, that other structure will not be as looming as what petitioner proposes to build, so that it will not similarly alter the character of the neighborhood. Hence, because what petitioner wants to build is different enough from the other developer's proposed structure, consistency, even if required by law, does not preclude denying petitioner's application for a variance.

On August 16, 2007, petitioner moved for reconsideration of the circuit court's order, arguing that the court failed to apply the proper standard in reviewing respondent's decision and that it relied on facts outside the record. Respondent countered that the court did not err in affirming the denial of the variance requests because the court applied the proper standard of review, did not rely on facts outside the record, and characterized the evidence consistent with the facts on the record. The circuit court denied petitioner's motion for reconsideration for the reasons stated in respondent's brief.

Petitioner raises three issues for our review.[2] First, petitioner claims that the circuit court did not apply the correct standard of review when reviewing respondent's decision. The

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[2] "This Court reviews de novo a trial court's decision in an appeal from a city's zoning board, while giving great deference to the trial court and zoning board's findings." *Norman Corp v East Tawas*, 263 Mich App 194, 198; 687 NW2d 861 (2004). "The decision of a zoning board should be affirmed by the courts unless it is (1) contrary to law, (2) based on improper procedure, (3) not supported by competent, material, and substantial evidence on the record, or (4) an abuse of discretion." *Reenders v Parker*, 217 Mich App 373, 378; 551 NW2d 474 (1996). Matters involving the interpretation of a zoning ordinance or the application of an ordinance to facts found by a zoning board of appeals are questions of law for the court to decide. *Macenas v Village of Michiana*, 433 Mich 380, 395-396; 446 NW2d 102 (1989). We review questions of law de novo. *Burt Twp v Dep't of Natural Resources*, 459 Mich 659, 662-663; 593 NW2d 534 (1999).

Michigan Zoning Enabling Act, MCL 125.3101 *et seq.*, codified the relevant standard of review at MCL 125.3606, which provides:

> (1) Any party aggrieved by a decision of the zoning board of appeals may appeal to the circuit court for the county in which the property is located. The circuit court shall review the record and decision to ensure that the decision meets all of the following requirements:
>
> (a) Complies with the constitution and laws of the state.
>
> (b) Is based upon proper procedure.
>
> (c) Is supported by competent, material, and substantial evidence on the record.
>
> (d) Represents the reasonable exercise of discretion granted by law to the zoning board of appeals.

The circuit court may affirm, reverse, or modify the decision of the zoning board of appeals, MCL 125.3606(2), or it "may make other orders as justice requires." MCL 125.3606(3).

Although the circuit court did not expressly cite MCL 125.3606, the court is presumed to know and understand the law. *In re Costs & Attorney Fees*, 250 Mich App 89, 101; 645 NW2d 697 (2002). Moreover, nothing in the statute requires that the court include language from MCL 125.3606 in its opinion. Nor does case law impose such a requirement. See *In re Grant*, 250 Mich App 13, 19-20; 645 NW2d 79 (2002) (in a decision involving the Veteran's Preference Act, MCL 35.401 *et seq.*, the Court held that the trial court's failure to specifically mention the standard of review was not reversible error).

The record in this instance reflects that the circuit court was fully appraised of the proper standard of review because each party cited it in its briefs, and the issue was discussed at the hearing. Further, nothing in the record indicates that the court was misinformed or misunderstood the applicable standard of review. In fact, in adopting respondent's brief in opposition to petitioner's motion for reconsideration as its own opinion, the court clearly recognized that the standard of review set forth in MCL 125.3606 was applicable to petitioner's appeal.[3]

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[3] Respondent's brief stated in relevant part:

> The statute governing this appeal, MCL 125.3606, does not impose specific requirements for the written opinion of a circuit court. The statute merely requires the circuit court to "review the record and decision to ensure that the decision meets" the four requirements set forth in the statute. MCL 125.3606(1). In affirming the BZA decision, the Court implicitly concluded after its review of the record and BZA decision that the requirements of MCL 125.3606 were

(continued…)

Next**,** petitioner argues that the circuit court erred by introducing and relying on facts outside the record. Specifically, petitioner argues that the court improperly recalled childhood memories of the subject property. Petitioner also challenges the court's description of the proposed buildings and surrounding area.

"Under MCL 125.585(11), the circuit court's review is confined to the record and decision of the zoning board of appeals." *Houdini Properties, LLC v City of Romulus*, 480 Mich 1022, 1023; 743 NW2d 198 (2008), citing MCL 125.585(11), the predecessor to MCL 125.3606(1). Although the circuit court may not consider new evidence, it is free to draw its own conclusions from the evidence presented to the zoning board of appeal. *Quigley v Dexter Twp*, 390 Mich 707, 710; 213 NW2d 166 (1973); *Abrahamson v Wendell* (*On Rehearing*), 76 Mich App 278, 282; 256 NW2d 613 (1977).

It is not evident that the circuit court's comments were improper. First, petitioner's site plans, which were submitted to respondent along with the variance requests, clearly depicted the area described by the court. Moreover, during oral arguments, petitioner's attorney supplied the court with a drawing of the proposed buildings. Many of the complained-about comments were merely the court's description of the site plan and other evidence. Nothing precluded the court from summarizing the evidence in its own words. In addition, there is no indication that the court based its finding on facts that were matters of personal knowledge. The judge's personal asides did not serve as the basis for its findings and conclusion that respondent's decision was based on competent, material, and substantial evidence on the record.

Finally, petitioner argues that the standards set forth in MCL 125.3606 require a reversal of respondent's denial of its variance requests. We disagree.

As noted, pursuant to the Zoning Enabling Act, the circuit court is required to review the record to determine if the decision of the zoning board of appeal complied with the constitution and law of the state, was based on proper procedure, was supported by competent, material, and substantial evidence[4] on the whole record, and represented the reasonable exercise of discretion granted by law. MCL 125.3606(1). We apply these factors to our review of the circuit court's decision. *Reenders*, *supra* at 378. If the zoning board's decision is supported by competent, material and substantial evidence on the whole record, and if there is a reasonable basis for its ruling, the courts should not interfere with its judgment. *Pere Marquette R Co v Muskegon Twp Bd*, 298 Mich 31, 36; 298 NW 393 (1941).

Petitioner filed its variances pursuant to Section 5.164 of the city ordinance, which authorizes the grant of a variance in certain, limited circumstances:

(…continued)

> satisfied. Appellant may desire a lengthier explanation of the Court's reasoning, but this is not a basis for asking the Court to reconsider its decision.

[4] "'Substantial evidence' is evidence which a reasoning mind would accept as sufficient to support a conclusion." *Tomczik v State Tenure Comm*, 175 Mich App 495, 499; 438 NW2d 642 (1989).

A. The board, after public hearing, shall have the power to decide applications, filed as hereafter provided for variances:

* * *

> 2. Where by reason of the exceptional narrowness, shallowness or shape of a specific piece of property on the effective date of the June 15, 1959, zoning ordinance, or by reason of exceptional topographic conditions, or other extraordinary situation or condition of the land, building or structure, or of the use or development of property immediately adjoining the property in question, the literal enforcement of the requirements of this chapter would involve practical difficulties or would cause undue hardship.
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> 3. Where there are practical difficulties or unnecessary hardship[s] in the way of carrying out the strict letter of this chapter relating to the construction, structural changes in equipment, or alterations of building[s] or structures so that the spirit of this chapter shall be observed, public safety secured, and substantial justice done.

B. No variance in the provisions or requirements of this chapter shall be authorized by the board unless the board makes findings, based upon competent[,] material and substantial evidence on the whole record:

> 1. That special conditions or circumstances exist which are peculiar to the land, structure or building involved and which are not generally applicable to the other lands, structures or buildings in the same district.
>
> 2. That the special conditions or circumstances do not result from the actions of the applicant.
>
> 3. That the authorizing of such variance will not be of substantial detriment to the neighboring property and will not be contrary to the spirit and purpose of this chapter.[5]
>
> 4. That with respect to use variances, the property cannot reasonably be used in a manner consistent with the existing zoning.

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[5] Respondent contends that sections (B)(2) and (3) do not apply to non-use variances, such as the one at issue. However, Michigan courts have applied "self-created hardship" and "unique circumstances" standards to non-use variances. See, e.g., *Johnson v Robinson Twp*, 420 Mich 115, 126; 359 NW2d 526 (1984) (holding that it was appropriate to consider requirements that hardships not be self-created and that the landowner's plight be "due to the unique circumstances of the property").

Section 5.164(A) simply sets forth conditions pursuant to which a variance application can be considered. The parties do not dispute that respondent was required to review petitioner's variance requests to determine whether "practical difficulties" existed.[6] Section 5.164(B) also provides standards, which are analogous to case law holdings that must be satisfied before a variance can be approved.

When analyzing practical difficulties in the context of a variance request, we consider "whether the denial deprives an owner of the use of the property, compliance would be unnecessarily burdensome, or granting a variance would do substantial justice to the owner." *Norman Corp*, *supra* at 203. Compliance with the ordinance in this case would not deprive petitioner of the use of its property and would not be unnecessarily burdensome. Petitioner may still use the property for the same purpose as it had before the variance was denied. And, although the variance denial may be somewhat burdensome, petitioner is not unnecessarily burdened because the ordinance is in place to maintain the community's aesthetic value and ensure its welfare, both of which are cognizable necessities.

Furthermore, the record reflects that there were no special conditions or circumstances regarding the property that were not shared by other properties in the zoning district. At least one adjoining property has building height and lot area density requirements similar to those of petitioner's property, and the record supports the finding that the PUD would have the same or similar impact on other property in the B-1 district.

Respondent also considered petitioner's concerns regarding the prospective practical difficulties the PUD might impose on the subject property. The record shows that respondent addressed whether the PUD would impact petitioner's property and concluded that it did not create any practical difficulties. That conclusion was reasonable and therefore we will not substitute our judgment for that of respondent. *Pere Marquette R Co*, *supra*.

Finally, there is evidence on the record to support respondent's findings that the variance request, if granted, would have a detrimental impact on adjoining property and would be contrary to the spirit and purpose of the zoning ordinance. The proposed buildings were not those contemplated by the B-1 zoning district because they are not "garden-type apartments or row housing" described in Section 5.101 of the ordinance. Additionally, they would be twice as tall as the B-1 height limitation and, as noted by respondent, would eliminate the existing buffer effect, which was another stated purpose of the B-1 zoning district according to Section 5.101. A community may take into account aesthetic considerations incidental to the valid exercise of its police power. *Sun Oil Co v Madison Heights*, 41 Mich App 47, 53; 199 NW2d 525 (1972). Thus, respondent had the discretion to consider the overbearing appearance of the proposed buildings on the surrounding community.

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[6] "To justify the grant of a non-use variance there need only be a showing of practical difficulty. It is not necessary to show unnecessary hardship." *Heritage Hill Ass'n, Inc v Grand Rapids*, 48 Mich App 765, 769; 211 NW2d 77 (1973).

In summary, respondent's decision was not contrary to applicable law or proper procedure and was adequately supported by competent, substantial, and material evidence on the record.

Affirmed.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood